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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (A. 30-44) is reported at 379 F. 2d 897. The opinion of the United States District Court for the Western District of New York (A. 23-29) is reported at 261 F. Supp. 579.

Jurisdiction

The judgment of the Court of Appeals was entered on June 28, 1967 (A. 45) and a timely motion for rehearing or rehearing in banc was denied by orders of the Court of Appeals entered on August 25, 1967 (A. 46-47). The petition for a writ of certiorari was filed on November 21, 1967 and was granted on January 22, 1968. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

Was the respondent labor union official's personal Fourth Amendment right to be secure in his "persons, houses, papers and effects" violated by the seizure of union books and records from the union office without a warrant?

Should federal habeas corpus review of final state court judgments of conviction be utilized as a vehicle for announcing new rules of standing in Fourth Amendment cases, especially where the trial of the habeas applicant occurred prior to the decision in *Mapp* v. *Ohio*, 367 U. S. 643.

Constitutional Provisions

Constitution of the United States:

Amendment IV. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

The respondent was a vice president of Local 266 of the Teamsters Union. He was indicted, along with two other union officials and twelve other defendants, by a grand jury of Nassau County, New York, for conspiracy (N. Y. Penal Law, former § 580), coercion (N. Y. Penal Law, former § 530), and extortion (N. Y. Penal Law, former §§ 850 and 851). The indictment charged that the defendants, using the Union Local as a facade and shield, were engaged in a conspiracy to monopolize the juke box industry in the metropolitan New York area in violation of New York General Business Law § 340. The indictment further charged that the defendants coerced and extorted money from juke box owners by compelling the payment of tribute in the guise of union initiation fees, dues and monthly assessments.

On May 13, 1959, prior to the return of this indictment, a subpoena duces tecum was issued to Local 266 by the Nassau County District Attorney's office commanding that the union forthwith produce certain of its books and records at the County Courthouse, Mineola, Long Island (A. 22). Upon the refusal of the respondent to comply with this subpoena, the union books and records were seized by the police and subsequently introduced, over objection, at the trial. Since the trial took place in 1960, prior to the decision in *Mapp* v. *Ohio*, 367 U. S. 643, there was no pre-trial motion to suppress or hearing in the state courts regarding the facts surrounding the search and seizure. Nor was there an evidentiary hearing in the District Court. However, the essential facts are not in dispute and were detailed in a stipulation submitted to the Circuit Court of Appeals in the form of a letter (A. 50-52).

The subpoena was served upon the respondent, as custodian of the union records, at the union office. The respondent, as a vice president of the union, had a desk in

the one large room which comprised the union office. There were other desks used by other union officials in this room. When the respondent refused to comply with the subpoena, the police, over the objection of several union officials present, including the respondent, seized certain union books and records. The seized items included the union charter, bank books, deposit slips, and check stubs. It does not appear in the record and it is not alleged that any of these items, or any other items, were taken from the respondent's person or from his desk or from any area set aside for his personal use. Nor does the respondent contend that any of the seized items were his personal property. He did, however, participate in the preparation of many of the seized union records in his capacity as a union official. The union, which was never charged with or indicted for any crime, apparently did not seek return of the seized items, most of which were introduced into evidence, over objection, at the respondent's trial.

The respondent and two other union officials were convicted by jury verdict and the respondent was sentenced on June 21, 1960 to state prison for a term of three to five years. The judgment of conviction was affirmed by the Appellate Division of the New York Supreme Court, that Court holding that the defendants could not invoke the Fourth Amendment to the Constitution with respect to the union records since they were not the personal papers and effects of the defendants who had possession of them in a representational rather than private capacity. *People* v. *DeGrandis, et al.*, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dept.). The New York Court of Appeals affirmed without opinion, *People* v. *DeGrandis, et al.*, 12 N. Y. 2d 812, 187 N. E. 2d 130, and amended its remittitur to indicate that it had held, *inter alia*, that no individual rights of the defendants had been violated by the search and seizure of the union records. 12 N. Y. 2d 946, 188 N. E. 2d 794. On October 14, 1963 this Court denied certiorari (375 U. S. 868).

Thereafter, the respondent sought a federal writ of habeas corpus on the ground of alleged coercion of the jury. The denial of the writ was unanimously affirmed by the Court of Appeals for the Second Circuit (335 F. 2d 173). The respondent, who was represented by the same counsel who prosecuted his state appeals, made no challenge to the seizure of the union records in that proceeding. See, 28 U.S.C. § 2244(b).

However, the respondent then sought another federal writ of habeas corpus, this time on the ground that the Fourth Amendment to the Constitution prohibited the introduction into evidence of the union's books and records which were seized when the union refused to produce them as demanded by the subpoena. The United States District Court for the Western District of New York (HENDERSON, J.) concluded that the standards enunciated in this Court's decision in *Jones* v. *United States,* 362 U. S. 257, did not apply to non-possessory crimes and would be singularly inappropriate if applied as a constitutional mandate to cases involving corporate or union books and records. Accordingly the District Court held that the respondent's constitutionally protected rights were not violated by the search of the union offices and the seizure of the union records. In reaching this decision the District Court followed a long line of decisions by this Court and by the Court of Appeals for the Second Circuit which emphasize the personal nature of Fourth Amendment rights (A. 27).

On appeal the Court of Appeals for the Second Circuit reversed and directed that the writ of habeas corpus issue. The Court observed that *Jones* v. *United States, supra,* did not formulate any affirmative tests for standing in cases such as this and concluded that decision must be made on a case-by-case basis. The Court of Appeals found that prior decisions of this Court, relied upon by the District Court, which declined to extend Fourth and Fifth Amendment rights in corporate or union records to corporate or union officials, were inapplicable under the circumstances

of this case. It held that the respondent was entitled to suppression of the union books and records because the search was "directed at" him and invaded his personal right of privacy since it occurred at his place of business; because he was lawfully on the premises when the search and seizure occurred; and because he had contributed to the preparation of a substantial portion of the books and records that were seized.

After the denial of motions for rehearing (A. 46) and rehearing in banc (A. 47), an order was entered in the United States District Court for the Western District of New York releasing the respondent on his own recognizance pending hearing and disposition of further proceedings in this Court (A. 48-49).

Summary of Argument

I. Notwithstanding the rule barring the introduction of unlawfully seized evidence at criminal trials, *Weeks* v. *United States*, 232 U. S. 283; *Mapp* v. *Ohio*, 367 U. S. 643, the Court has continued to adhere to the common law rule of non-exclusion of such evidence in the absence of a showing that the objecting defendant's personal rights of privacy and security were infringed by the allegedly unlawful search and seizure. *Wong Sun* v. *United States*, 371 U. S. 471; *Goldstein* v. *United States*, 316 U. S. 114. The challenged evidence in the instant case does not fall within the exclusionary rule because the union records taken from the union offices concededly did not belong to the respondent and he therefore had no personal rights or privileges with respect to them and the place from which the records were taken was not an area in which the respondent had a constitutionally protected right of personal privacy.

A. It is well established that a union or corporate officer has no personal privileges under either the Fourth or the Fifth Amendment with respect to the corporate books and

records even if he is charged with their custody. *United States* v. *White*, 322 U. S. 694; *Wilson* v. *United States*, 221 U. S. 361. A union or corporate official who has custody of the organization's books "does not own the records and has no legally cognizable interest in them." *Curcio* v. *United States*, 354 U. S. 118, 128. This conclusion is unaffected by the fact that the official may have prepared part or all of the records in his official capacity or by the fact that the records are taken because of an investigation directed against the individual rather than against the organization. *Wilson* v. *United States, supra.* Accordingly, the taking of the union records in the instant case did not infringe the personal right of the respondent to be secure in his "papers or effects" and the Circuit Court of Appeals incorrectly concluded that the search and seizure of the union records in this case violated any of the respondent's Fourth Amendment rights. See, *e.g.*, *United States* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied* 375 U. S. 906; *Lagow* v. *United States*, 159 F. 2d 245 (2d Cir.); *cf.*, *United States* v. *Silverstein*, 314 F. 2d 789 (2d Cir.), *cert. denied*, 374 U. S. 807.

B. Individuals may complain of a search of commercial premises only where they can show that the search violated their personal rights, such as where a private desk is searched and private papers seized, *Gouled* v. *United States*, 255 U. S. 298; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Blok*, 188 F. 2d 1019 (D. C. Cir.), or where the search occurred on premises over which the individual has exclusive personal control. *See* v. *City of Seattle*, 387 U. S. 541. But the respondent has failed to show that his relationship to the place where the search occurred, *Katz* v. *United States*, 389 U. S. 347; *United States* v. *Lewis*, 385 U. S. 206, rendered the search and seizure an "intrusion in the sanctity of a man's home and the privacies of life." *Boyd* v. *United States*, 116 U. S. 616, 630. The union office consisted of one large

room shared by several people including the respondent and there has been no claim that the respondent's desk or any other area set aside for his personal use was searched. Thus, no personal rights of the respondent were violated by the search of the union premises. The case of *Jones* v. *United States*, 362 U. S. 257, does not warrant a different result. The crux of that decision, insofar as the individual's relationship to the premises is concerned, is that an individual cannot be denied standing solely because his presence on the premises could be described by a common law property category of less than owner. However, that case did not hold that simple presence on the premises conferred standing in the absence of any personal or private interest in the premises; on the contrary, the decision adhered to the requirement that "a legally requisite interest in the premises", 362 U. S. at p. 261, be shown in order for an individual to claim that a search of the premises violated his personal constitutional rights. Indeed the Court emphasized that the individual is required to show "that he himself was the victim of an invasion of privacy", 362 U. S. at p. 261. The Fourth Amendment protects the individual only against such invasions, *Warden* v. *Hayden*, 387 U. S. 294, and the respondent has failed to show on this record that his personal privacy was invaded by the search and seizure in this case.

II. A holding that the respondent's personal Fourth Amendment rights were violated by the search and seizure in this case would represent a significant departure from prior rules of standing under the Fourth Amendment and, like other new Fourth Amendment rules, should not be enunciated on collateral attack so as to apply retrospectively to final judgments of conviction. *Angelet* v. *Fay*, 381 U. S. 643. In any event, the respondent should not be entitled to invoke the exclusionary rule of *Mapp* v. *Ohio*, *supra*, in this federal habeas corpus proceeding since his trial commenced and was concluded prior to the date of that decision. *Johnson* v. *New Jersey*, 384 U. S. 719.

POINT I

The taking without a warrant of the books and records of the local union from the union offices was not violative of any of the respondent's personal constitutional rights.

It was a well established rule at common law that the means by which evidence was procured did not affect its admissibility at trial unless the evidence was obtained in violation of the privilege against self-incrimination. McCormick, Evidence § 137 (1954); 8 Wigmore, Evidence §§ 2183-2184 b, 2264 (McNaughton Rev. 1961). Even after the landmark case of *Boyd* v. *United States,* 116 U. S. 616, this rule was followed by the Court with respect to Fourth Amendment claims. *Adams* v. *New York,* 192 U. S. 585. However, with emphasis upon the protection against invasions of "the sanctity of a man's home and the privacies of life", *Boyd* v. *United States,* 116 U. S. at p. 630, a further exception to the common law rule was announced in *Weeks* v. *United States,* 232 U. S. 383. This exclusionary rule has evolved from a dual but complementary concern for the protection of individual privacy and the protection against compulsory self-incrimination reflected in the Fourth and Fifth Amendments which together maintain large areas of personal privacy inviolate from governmental invasion. *Mapp* v. *Ohio,* 367 U. S. 643, 656-57.

The Court has nevertheless consistently recognized that "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land". *Nardone* v. *United States,* 308 U. S. 338, 340. Rules of standing must be considered in this context. In order to insure that the values of personal freedom and security expressed in the Constitution remain inviolate, it is necessary for society sometimes to pay the price of freeing the guilty. However,

society also must be protected from increasingly pervasive criminal activities; with this in mind, relevant evidence of guilt should be excluded only where it is unmistakably clear that such a drastic measure is required to protect the personal rights secured by the Constitution.

The Court has recognized the need for striking such a balance and has accordingly adhered to the common law rule of non-exclusion of unlawfully seized evidence where it does not appear that the individual defendant's personal rights of privacy and security were invaded. *Goldstein* v. *United States*, 316 U. S. 114. See also, *Wong Sun* v. *United States*, 371 U. S. 471, where the Court emphasized at p. 484 that the *Weeks* exclusionary rule was designed "to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person" and therefore refused to exclude unlawfully obtained evidence from use against a defendant who had no right of privacy of person or premises invaded by the seizure. In evaluating a claim of standing, the Court must look to whether or not the government invaded the objecting defendant's rights of personal privacy and security, *i.e.*, the right to be secure in *his* "persons, houses, papers and effects". As the Court has pertinently observed:

> "What the Fourth Amendment protects is the security a man relies upon when he places *himself* or *his property* within a constitutionally protected area, be it *his* home or *his* office, *his* hotel room or *his* automobile. There he is protected from unwarranted intrusion. And when he puts something in *his* filing cabinet, in *his* desk drawer or in *his* pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure. . . ." *Hoffa* v. *United States*, 385 U. S. 296, 301. (Emphasis supplied.)

Tested by this standard as well as by the prior decisions of the Court, the search of the union offices and seizure of

the union records did not violate any of the respondent's Fourth Amendment rights. The records concededly did not belong to the respondent and he had no personal rights with respect to them and the place from which they were seized was not an area in which the respondent had a constitutionally protected right of personal privacy. He was, therefore, not entitled to the exclusion of the union books and records at his trial.

A.

The respondent labor union official had no personal constitutional privilege with respect to the union books and records.

The Court has consistently concluded that a corporate or union official who has custody of the organization's books and records "does not own the records and has no legally cognizable interest in them" and therefore cannot protest against their compulsory production. *Curcio* v. *United States,* 354 U. S. 118, 128. Moreover, the rationale of this conclusion is usually found by reference to the condemnation in *Boyd* v. *United States, supra,* of compulsory production of *private* papers. See, *Hale* v. *Henkel,* 201 U. S. 43. Thus, in *Wilson* v. *United States,* 221 U. S. 361, the Court held that, because of the nature of corporate documents and the purely custodial capacity in which they were held, the corporate officer had no personal privilege with respect to such documents and distinugished the *Boyd* case because of the emphasis in that case upon the fact that *private* papers were involved. 221 U. S. at p. 380. Similarly, in *United States* v. *White,* 322 U. S. 694, this rationale was extended to a labor union official who was held to have no personal Fourth or Fifth Amendment rights to object to the compulsory production of union records since the only papers and effects which are subject to a personal privilege "must be the private property of the person claiming the privilege, or at least in his possession in a

purely personal capacity. *Boyd* v. *United States*, 116 U. S. 616". 322 U. S. at p. 699. In *White*, as in the case at bar, "the documents [the union officer] sought to place under the protective shield of the privilege were official union documents held by him in his capacity as a representative of the union. No valid claim was made that any part of them constituted his own private papers". 322 U. S. at p. 704.

It is true, as the Circuit Court of Appeals noted (A. 41, n. 9) that these are all cases in which the corporate or union officer was convicted of contempt for failure to comply with a valid subpoena rather than, as in the instant case, a seizure of the books. But to distinguish the cases on that ground, as the Circuit Court did, is to ignore the principles of law which they explicitly announced—that the corporate or union official has no personal privilege, under either the Fourth or the Fifth Amendment, in the union or corporate records. Since the officers of an organization are engaged in institutional activity as opposed to wholly individual activity, they can make no claim of personal privilege regarding the organization's records. *United States* v. *Silverstein*, 314 F. 2d 789 (2d Cir.), *cert. denied*, 374 U. S. 807. Thus, the manner in which the books are taken cannot, as the Circuit Court seemed to assume, clothe the books and records with a personal privilege which did not exist before they were seized. Non-private papers do not become private by virtue of an unlawful seizure.

The cases have consistently emphasized "the character of the books and records as corporate records and documents", *Wheeler* v. *United States*, 226 U. S. 478, 490, in concluding that such records are clothed with no personal privilege on behalf of the official who is a mere custodian rather than the owner. See, *e.g.*, *Owen* v. *Kennedy*, —— U. S. ——, 11 L. ed. 2d 18; *United States* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied*, 375 U. S. 906; *Lagow* v.

United States, 159 F. 2d 245 (2d Cir.); *United States* v. *Goldberg*, 330 F. 2d 30 (3d Cir.), *cert. denied*, 377 U. S. 953; *Hill* v. *United States*, 374 F. 2d 871 (9th Cir.), *cert. denied*, 389 U. S. 842; *United States* v. *Epstein*, 240 F. Supp. 84 (S.D.N.Y.). This conclusion is, of course, the most consonant with the language of the Fourth Amendment; simply stated, that Amendment does not guarantee an individual freedom from unreasonable searches of a third party's property.

Moreover, the Circuit Court's disregard of cases of this Court on the ground that they involved a Fifth rather than a Fourth Amendment privilege was completely unjustified. In the first place, such cases as *Wilson* and *White* explicitly deal with both the Fourth and Fifth Amendments. Secondly, and most important, it would be irrational to conclude that an individual's personal rights in books and records varied according to which Amendment he invokes. No personal privilege is more firmly imbedded in our law than the privilege against self-incrimination. See, *e.g.*, *Boyd* v. *United States*, *supra*. Even the most minimal personal interest in incriminating documents may justify a conclusion that a defendant may not be compelled to produce them. Corporate records have been held many times by the Court not to be clothed with even this minimal personal interest. The personal rights of a corporate officer for Fourth Amendment purposes cannot be any greater. Indeed, the Court's statement in *Curcio* v. *United States*, 354 U. S. at p. 128, that an official who has custody of an organization's records "has *no* legally cognizable interest in them" (emphasis supplied) can only be read to exclude any Fourth Amendment as well as any Fifth Amendment interest. This is particularly true in cases involving documents and papers where "the Fourth and Fifth Amendments run almost into each other". *Boyd* v. *United States*, 116 U. S. at p. 630. See also, *Mapp* v. *Ohio*, 367 U. S. at pp. 656-657 and the concurring opinion of Mr. Justice Black, 367 U. S. at p. 661; *Davis* v. *United States*, 328 U. S. 582.

Finally, the Circuit Court, casually brushing aside the clear meaning of both its own decisions and those of this Court, pointed to several factors which it felt operated to clothe the union books and records with a sufficient personal interest on the part of the respondent to justify their conclusion that his personal security and privacy were violated by the seizure. First, said that Court, the records became his private records within the meaning of the Fourth Amendment because the search was "directed at" the respondent and not at the union (A. 39). Secondly, implied the Court, the fact that the respondent prepared a substantial part of the union books and records in his capacity as a union official somehow clothed them with an aura of personal privacy (A. 40). Sufficient answer to both contentions was long ago provided by this Court in *Wilson* v. *United States,* 221 U. S. at p. 378:

> ". . . the mere fact that the [respondent] himself wrote, or signed, the official letters copied into the books, neither conditioned nor enlarged his privilege . . ."

and at p. 385:

> "Nor is it any answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses."

These unequivocal rejections of the Circuit Court's theory are well founded in reason. Most individuals who assert a privilege in corporate records will have prepared a significant portion of such records but the point is that they will have done so in other than a personal, private capacity just as they are not custodians of the records in a personal, private capacity. As the Court emphasized in

Wilson v. *United States*, 221 U. S. at p. 380, "The question still remains with respect to the nature of the documents and the capacity in which they are held." But neither the respondent nor the Circuit Court addressed themselves squarely to this question and neither has suggested how the nature of corporate documents becomes personal and private simply because a corporate officer has prepared a part of the documents which reveal his criminal activities. The logic of the Circuit Court's reasoning would mean that an embezzler could claim a privilege in the altered books of his employer. Or, in the context of this case, that the respondent, who utilized a local union as an instrumentality for his illegal activities could subrogate himself to any Fourth Amendment claim the union might assert. No important constitutional purpose would be furthered by such a rule.

Similarly, the "directed against" standard employed by the Circuit Court is irrational. It totally fails to explain how a search for non-private papers converts these papers into private papers. Moreover, carried to its logical conclusion, such a standard offers a shelter only to those whom the police suspect of crimes. Surely the right of personal privacy in "papers and effects" is not to be tested by what is in the mind of the police officer who conducted the search.* Finally, the Circuit Court appears to reason that since the union was never charged with a crime, there is all the more reason to conclude that the respondent was the object of the search and should have standing. This is circular. The argument is that if the union had also been charged, it could object under the Fourth Amendment and

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* In the context of this case, such a test would be particularly meaningless. There were fifteen defendants, including respondent, indicted and tried in this case. It is difficult to perceive how the seizure, which occurred prior to the return of the indictment, could truly be said to have been "directed against" any one or more individuals in particular, in terms of what the police were looking for.

obtain return of its records. Since it was not charged and apparently did not seek return of its records, there is no reason why the respondent should in effect be held to have the rights which the union might have asserted *arguendo*.

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, does not require a different conclusion. That case deals with the assertion of Fourth Amendment rights by the corporation, unlike the instant case where the respondent attempts to assert personal rights derivative from the intrusion onto union premises and seizure of union records. The crux of the *Silverthorne* decision is that the government should not be permitted to subvert an order directing the return of property unlawfully seized by them by then attempting to subpoena that same property. Indeed this is the only reading of *Silverthorne* consistent with the principle that corporate papers may be subpoenaed in an investigation of a corporate officer. And this is far from establishing any kind of independent derivative right in favor of the corporate officer.

Thus, none of the factors or standards proposed by the Circuit Court of Appeals is sufficient to establish that the respondent had a personal interest in the union records, which concededly did not belong to him, so that their seizure was a seizure of "his . . . papers or effects". In consequence, the seizure of the union's papers did not, as such, violate any of the respondent's Fourth Amendment rights.

B.

The respondent's Fourth Amendment rights were not infringed by the search of the union offices.

A fundamental principle of our society is that an individual is entitled to rely upon the privacy of his home. His activities there, as well as any "papers or effects" which he keeps there, are explictly protected by the Fourth

Amendment. The inviolability of the home rests upon the presumption that what occurs in the home or what is kept there is intended to be kept secret at the discretion of the individual and the individual is entitled to rely upon this secrecy. This presumption can be overcome, *cf., Lewis* v. *United States,* 385 U. S. 206, but it rests upon the strong belief that an individual controls the activities in his home and it is properly within his control to determine whether such activities remain secret or not. Once outside of the home, the individual must show that there is something about his relationship to the place which entitles him to believe that he has control over whether activities conducted there or items kept there will remain secret.

The Fourth Amendment is designed to protect individual privacy against certain kinds of intrusion and its applicability must be determined by an analysis of the individual's relationship to the place where such an intrusion occurs. *Katz* v. *United States,* 389 U. S. 347. Although the privacy which the Fourth Amendment protects is to some extent dependent upon the intention of the individual not to disclose certain things, *Katz* v. *United States, supra,* this cannot be the sole test. If it were, then depositing something in an open field with the intent that it remain hidden would entitle the individual to the protection of the Fourth Amendment with respect to the hidding place. But the Fourth Amendment no more extends to this, *cf., Hester* v. *United States,* 265 U. S. 57, than it would to the activities of the defendant in a telephone booth which are visible to persons outside the booth. *Katz* v. *United States, supra,* at p. 352.

The Fourth Amendment should not automatically be interpreted to mean that an individual corporate or union officer or employee is entitled to believe that the organization's books and records and premises are identical with his "persons, houses, papers and effects" so that they are clothed with a personal privilege on his behalf. Just

as his role as custodian of the records gives him no personal rights in the records, his role as an officer or employee of the institution does not, without more, give him any personal rights in the union or corporate premises. This does not necessarily mean that there are no circumstances in which the individual's personal Fourth Amendment rights may be violated by a search of corporate or union premises. But the respondent has made no showing that the search and seizure here intruded into anything more private than an office which he shared with others and books and records which he helped prepare in his capacity as a union official. The only personal or private factor is that the respondent was using his position as a union official to engage in criminal activities. Surely the use of the union offices as a base for his criminal activities no more entitles him to the shelter of the Fourth Amendment, than the use of the home for such purposes entitled the defendant in *Lewis* to the shelter of the Fourth Amendment.

In the instant case, there has been no claim that any area set aside for the exclusive personal use of the respondent, such as his desk or his locker, was searched. *Compare, United States* v. *Blok,* 188 F. 2d 1019 (D. C. Cir.), *with Freeman* v. *United States,* 201 A. 2d 22 (D. C. Court of Appeals), and *United States* v. *Collins,* 349 F. 2d 863 (2d Cir.), *cert. denied,* 383 U. S. 893, *rehearing denied,* 324 U. S. 947. *But see also, Villano* v. *United States,* 310 F. 2d 680 (10th Cir.), *and compare with Cooper's Express* v. *I.C.C.,* 330 F. 2d 338 (1st Cir.). Nor was the respondent's private office searched; on the contrary, it appears that the union offices consisted of one large room in which several people, including the respondent, had desks. Thus there is no support for the Circuit Court's assumption, basic to its conclusion, that the office was the union office *de jure,* but the respondent's office *de facto* (A. 40). Under these circumstances, the search of the office and seizure of union books and records could

hardly be called as intrusion into "the sanctity of a man's home and the privacies of life". *Boyd* v. *United States,* 116 U. S at p. 630.

Prior decisions of this Court dealing with searches of offices or commercial premises support this conclusion. For example, in *Gouled* v. *United States,* 255 U. S. 298, not only was the search conducted in the defendant's private office but also the defendant's personal desk was searched and his private papers seized. Similarly, in *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, there was a search of the persons of the individual corporate officers as well as a search of their desks and even a seizure of some items belonging to the individuals. Accordingly, *Go-Bart* was not followed in a case involving seizure of only corporate records from corporate premises. *United States* v. *DeVasto,* 52 F. 2d 26 (2d Cir.), *cert. denied* 284 U. S. 678. *See* v. *City of Seattle,* 387 U. S. 541, dealing with administrative investigations, reiterates the rule that commercial premises may be clothed with an individual right of privacy. There the defendant was the owner of a warehouse that was maintained as locked premises that were inaccessible to anyone except the defendant (see 408 F. 2d 262). Thus, his right to use the premises was an exclusive personal right. It is not difficult to conclude that a search of such premises would constitute an intrusion on the defendant's personal privacy. But in the case at bar there is no claim that the respondent's right to use the premises was a personal right and it clearly appears that it was not an exclusive right.

Contrary to the view of the Circuit Court of Appeals in the instant case, *Jones* v. *United States,* 362 U. S. 257, should not be read as warranting a different result. Indeed that decision is consistent with the view that an individual must have a personal or private right in the premises in order to maintain that a search of the premises invaded his personal Fourth or Fifth Amendment rights. In *Jones* the defendant was tried for and convicted of possession of narcotics. Prior to trial he moved to sup-

press narcotics and narcotics paraphernalia on the ground that the warrant pursuant to which this evidence was seized had been issued without probable cause. The defendant did not allege ownership of the seized items and the testimony on the motion to suppress revealed that the evidence was seized from an apartment belonging to a friend of the defendant who had given the defendant his own key to gain admission on the day of the search and was in the apartment at the time of the arrest and search. The lower federal courts had held that the defendant lacked standing to suppress the evidence since he had not alleged ownership of the property seized and was at most a guest or invitee in the apartment. This Court held that the defendant did have standing to object to the search and vacated the conviction.

The Court's reasoning began with the assumption that "restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and security of property" and, accordingly, that anyone objecting to a search must establish "that he himself was the victim of an invasion of privacy", 362 U. S. at p. 261. This prerequisite was not eliminated by other language in the *Jones* decision, as the Court below seemed to assume. Quite the contrary, this Court recognized that prosecutions for possessory crimes present a "special problem", 362 U. S. at p. 261, because of the dilemma facing an accused if he must allege ownership or a possessory interest in the property seized in order to make a prima facie showing of standing to object. Thus, the Court held that the necessity for demonstrating an interest in the property seized, "which is ordinarily required when standing is challenged", 362 U. S. at p. 263, must, in fairness to the defendant, be dispensed with in cases involving possessory crimes. This, of course, is the *holding* of *Jones*.

But the Court went on to observe that, even if *Jones* had not involved a possessory crime, the defendant had

established "the legally requisite interest in the premises" 362 U. S. at p. 263. The Court rejected prior lower court decisions which had resolved questions of the legally requisite interest in the premises by resorting to distinctions made in the common law of property between "guests", "invitees", "licensees", etc. The Court, thus, held that an individual could not be denied standing solely because his presence could be described by a common law property category of less than an owner. It is important, however, to emphasize that the Court did *not* hold that simple presence on the premises conferred standing in the absence of *any* personal or private interest in the premises. Indeed, to read the *Jones* case as so holding would be in conflict with the emphasis elsewhere in the opinion upon the necessity that a person have "a legally requisite interest in the premises", 362 U. S. at p. 261, in order to claim that a search of the premises violated his constitutional rights.

The crux of the *Jones* decision, insofar as the premises are concerned, is that someone who has been given the right to use an apartment for his personal use is entitled to the protection of the Fourth Amendment with respect to that apartment since a search of the apartment intrudes upon an area to which he has a personal right of privacy.

Accordingly, the Circuit Court was erroneous here in its apparent conclusion that "anyone legitimately on the premises" must be considered to have a personal right of privacy with respect to such premises. Such an interpretation is unfounded in law and makes little sense in practice. The rationale for requiring a legally requisite interest in the premises as a prerequisite to standing to object to a search is that, in order to have standing, an individual must demonstrate that his personal right of privacy was invaded—"that he himself was the victim of an invasion of privacy." 362 U. S. at p. 261. Surely the question of whether or not an individual has a personal right of privacy in the premises cannot depend, as the Court below

seemed to conclude, on whether or not he is actually present when the search occurs.

For example, if Jones' right of privacy in the premises were sufficient irrespective of what common law category is used to describe it, his absence at the time of the search could not have diminished his right of privacy in the premises or made the search any less an invasion of that right which is protected by the Fourth Amendment. Indeed this was the result in *United States* v. *Jeffers,* 342 U. S. 48, where it was held that evidence obtained, in the defendat's absence, from a hotel room which the defendant was permitted to use should be suppressed. And it was apparently concluded in *United States* v. *Lewis, supra,* that the defendant's personal privacy was not invaded notwithstanding his presence at the time of the "search". Similarly, in the case at bar, whatever right of privacy the respondent may have had could not have been changed, if, for example, the respondent had been at lunch or on a business call when the search occurred.

Thus the persistent emphasis by the Circuit Court on the respondent's actual presence at the time of the search is beside the point. It is based upon an out of context reading of part of the language of the *Jones* case and diverts attention from the real inquiry which should be a consideration of whether the respondent was the "victim", 362 U. S. at p. 261, of an unlawful search and seizure. In this context "victim" cannot mean, as the Circuit Court assumed, that the evidence was ultimately used against the respondent. On the contrary, a "victim" of an unlawful search is one who suffers an "invasion of privacy", 362 U. S. at p. 261, by virtue of the search. Moreover, to the extent that *Jones* can be read as condemning a search where its purpose is to gather evidence against a defendant and is "directed against" him in that sense, it no longer represents the law. *Warden* v. *Hayden,* 387 U. S. 294. Since it is now clear that a search does not violate an individual's right of privacy simply because its

purpose is to acquire evidence against him, *Jones* cannot be interpreted as meaning that such a purpose, as expressed in the "directed against" test, automatically results in an invasion of the defendant's privacy. Thus, a search should be considered "directed against" an individual only if it intrudes upon his personal privacy, rather than in terms of the intent of the police officers conducting the search. See, *infra*, pp. 14-16.

Finally, to read *Jones* as meaning that anything short of wrongful presence on the premises results in a constitutionally protected right of privacy in the premises would ignore the Court's command that the paramount purpose of the Fourth Amendment is to protect privacy rather than property. *Warden* v. *Hayden, supra.* If "legitimately on the premises" is the standard, the result would be to afford an individual constitutional protection against the invasion of property without regard to the objecting individual's personal interest in the property. As the District Court noted in the instant case (A. 28), such a test would mean that a janitor who is present when corporate books are seized could object if he had hidden incriminating evidence in them but that the president of the company who was not present at the time of the seizure could not object. In a case such as the one at bar, it would mean that the intrusion into the union offices violated the respondent's constitutional rights even though the respondent had no personal rights in the office or in the places searched or the items seized. Such a result would focus the inquiry on the intrusion or trespass on the property rather than on the objecting individual's personal rights in the property. This is precisely the kind of emphasis upon property condemned in both *Warden* v. *Hayden, supra,* and *Katz* v. *United States, supra,* and is not supported by prior decisions of the Court. On the contrary, considering the relationship of the respondent to the premises searched and property seized, *cf., Katz* v. *United States, supra,*

United States v. *Lewis, supra,* there is no plausible basis to conclude that the respondent's Fourth Amendment rights were violated by the search and seizure in the instant case and sound reasons for not adopting the view of the Circuit Court here extending the Fourth Amendment to encompass the respondent's claim.

POINT II

New rules of standing in Fourth Amendment cases should not be enunciated on habeas corpus review of the respondent's final state court judgment of conviction especially since the respondent's trial occurred prior to the decision in *Mapp* v. *Ohio*.

As we have shown, a holding that the respondent's personal Fourth Amendment rights were violated by the search and seizure in this case would represent a new rule of standing under the Fourth Amendment. Such a significant departure from prior Fourth Amendment rules and the enunciation of a new and extensively broadened rule of standing dealing with corporate or union records, like any other new Fourth Amendment rule, should not be made on collateral attack so as to apply retrospectively to final state court judgments of convictions. *Angelet* v. *Fay,* 381 U. S. 643.

Moreover, the rationale for prospective application of new search and seizure rules stated in *Linkletter* v. *Walker,* 381 U. S. 618, should preclude this respondent from raising any claim under *Mapp* v. *Ohio, supra.* The respondent was sentenced on June 21, 1960, and *Mapp* was decided on June 19, 1961. He raised the search and seizure claim now presented on his appeal to the Appellate Division, Second Department, and on his appeal to the New York Court of Appeals, both of which courts held that no personal rights of the respondent were violated by the search and seizure. On October 14, 1963

this Court denied certiorari to review the precise search and seizure claim which the Circuit Court, four years later, concluded was, after all, a valid claim. Consideration of his claim on direct appeal was a result of the fundamental principle that a case in the direct appellate process when a change in the law occurs should be decided according to the new law. *United States* v. *The Schooner Peggy,* 5 U. S. (1 Cranch) 102. Indeed, on the basis of this principle, the Court has applied *Mapp* to cases which were in the direct appellate process when *Mapp* was decided and which reached the Court in the direct appellate process. *Ker* v. *California,* 374 U. S. 23; *Fahy* v. *Connecticut,* 375 U. S. 85; *Stoner* v. *California,* 376 U. S. 483. However, when certiorari was denied this case passed from the direct appellate process, *Linkletter* v. *Walker, supra,* at p. 622 N. 5, and the respondent should no longer be entitled to invoke this principle in collateral attacks such as the one at bar.

Neither *Linkletter* nor *Tehan* v. *Shott,* 382 U. S. 406, involved the availability and scope of federal habeas corpus to persons who, like the respondent, sought to take advantage of rules effective subsequent to their trial. However, decisions such as *Ker, Fahy* and *Stoner,* which applied new rules to cases still in the direct appellate process when they reached the Court, are assumed to have "established without discussion", *Johnson* v. *New Jersey,* 384 U. S. 719, at p. 732, that new search and seizure rules would be applicable on habeas corpus to cases still in the direct appellate process when the rules were enunciated. Of course, there is nothing inevitable about such a conclusion. On the contrary, it would be logical to provide that new rules announced while a person was in the direct appellate process would be applied to his appeal under the principle of *The Schooner Peggy,* but that on collateral attack the applicability of such new rules should be limited to trials which began subsequent to the date of decisions announcing such rules. *Johnson*

v. *New Jersey, supra; Stovall* v. *Denno,* 388 U. S. 293. Indeed, the date of trial as the cut-off date is particularly appropriate in cases dealing with evidentiary matters since such a rule would not penalize the People because the prosecution offered and the judge admitted evidence which was admissible as of the date of the trial.

There is no inherent reason why *Mapp* should be more broadly retrospective on collateral attack than cases involving statements taken in the absence of counsel and introduced in evidence at trial, *Johnson* v. *New Jersey, supra,* or than testimony regarding pre-trial identifications, *Stovall* v. *Denno, supra.* And the respondent should, accordingly, be entitled to no broader consideration on collateral attack than a habeas corpus applicant who had completed the appellate process before *Mapp* was decided.

CONCLUSION

For the foregoing reasons, the order of the Circuit Court of Appeals should be in all respects reversed.

Dated: New York, New York, March 6, 1968.

Respectfully submitted,

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